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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

WILLIAM R. POUNDERS, Judge of the Superior Court of the State of California for the County of Los Angeles,

Petitioner,

vs.

PENELOPE WATSON,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court judge during the course of a multi-defendant felony criminal jury trial may constitutionally summarily find an attorney in contempt for twice willfully violating in open court orders not to ask certain prejudicial questions if the statute under which the contempt is imposed limits punishment to no more than a $1,000 fine and imprisonment in jail for no more than 5 days or both.

2. Whether the provisions of 28 U.S.C. §2254(d), providing that state court factual findings are presumed to be correct in federal habeas corpus proceedings, is violated when a federal appeals court accepts the state court's findings that an attorney twice willfully disobeyed a court order not to ask certain prejudicial questions during a felony criminal jury trial after numerous prior warnings to other counsel in the case, but finds that summary contempt procedures were not necessary to preclude further violations and disruption of the trial.

PARTIES

The parties to the underlying proceeding for which review is sought are:

Petitioner below:

Penelope Watson

Respondents below:

Sherman Block, Sheriff of the County of Los Angeles

Daniel Lungren, Attorney General of the State of California

William R. Pounders, Judge of the Superior Court of the State of California for the County of Los Angeles

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JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on December 13, 1996 and this petition was timely filed within 90 days as permitted by 28 U.S.C. §2101(c).

The Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254(1), which provides that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions appear in the appendix hereto:

United States Constitution, Amendment 6

United States Constitution, Amendment 14, Section 1

28 U.S.C. §2254, subdivision (d)

California Code of Civil Procedure §1209, subdivision (5)

California Code of Civil Procedure §1211

California Code of Civil Procedure §1218

California Code of Civil Procedure §1222

STATEMENT OF THE CASE

Respondent attorney Penelope Watson represented one defendant in a multi-defendant criminal murder jury trial that began on March 28, 1994, and lasted for three months. On April 7, 1994, an attorney for one of the co-defendants in open court repeatedly raised the issue of the punishment the defendants faced. The trial judge stated categorically that possible punishment "is not a subject open to discussion. It should not be explored." On April 20, the attorney for a different co-defendant again raised the issue of punishment, and the trial judge stated again that such questioning is prejudicial and is not to be discussed. On April 21, Ms. Watson's co-counsel asked a series of seven questions in which he stated that the defendants were "looking at life in prison." At side bar,

the trial judge told Ms. Watson's co-counsel that the matter was not to be discussed again.

On June 21, 1994, Ms. Watson asked a question of her client that referred to the penalty he faced (life without parole). The trial judge warned her to follow the court's prior admonishments that the subject of prior punishments was not to be explored. Ms. Watson's next question of her client was, "You're facing life without possibility of parole?"

At the side bar which followed immediately, Judge Pounders asked Ms. Watson why she should not be held in contempt, rejected her contention that she didn't think the question was in violation of the court's orders, and found her in contempt of court for violating California Code of Civil Procedure §1209(a)(5), which provides that disobedience of any lawful order is a contempt of court, and for which a $1,000 fine or five days in jail, or both is the maximum permissible punishment. California Code of Civil Procedure §1218(a). The next day on June 22, 1994, the trial judge issued a written order of contempt, finding that "the questions asked by contemnor . . . in the presence of the jury had as [their] sole purpose improperly advising the jury of the potential penalty for the defendants in violation of the court order" and that "the contemnor was aware of the order," and imposed a 2-day jail sentence to be served after trial.

On July 8, 1994, two days after the case was submitted to the jury, the trial judge gave Ms. Watson a further opportunity to explain her conduct. Ms. Watson represented by counsel provided a further explanation which the trial judge found unconvincing.

Ms. Watson's habeas petitions to the California Court of Appeal and Supreme Court were denied summarily.

Her habeas petition to the United States District Court for the Central District of California was denied on September 8, 1994, without an evidentiary hearing on the grounds that "[t]he record makes it quite clear that multiple statements made in open court gave Petitioner adequate warning to put a person of reasonable intelligence on notice as to what conduct Judge Pounders had prohibited, satisfying the due process notice requirements."

On appeal from the district court's denial of her habeas petition, the Ninth Circuit Court of Appeals on December 13, 1996, reversed the district court's order denying the habeas petition and remanded for entry of judgment granting her petition. Accepting Judge Pounder's findings that Ms. Watson willfully disobeyed a court order, and acknowledging Judge Pounder's concern that Ms. Watson's questions might prejudice jurors in favor of her client, the Ninth Circuit concluded that Ms. Watson's questions did not pose a sufficient threat to the orderly administration of justice to justify summary contempt procedure.

This petition for certiorari to the United States Court of Appeals for the Ninth Circuit is timely filed within ninety days of the filing of the Ninth Circuit opinion on December 13, 1996. Jurisdiction is conferred upon the Supreme Court pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING CERTIORARI

1. The Ninth Circuit Court of Appeals has decided an important question in a way that conflicts with a decision by a state court of last resort.

The California Supreme Court has long held that when a contempt order is based on the statements of an attorney made in open court in language that is not itself insolent, contemptuous, or disorderly, a warning is required before an attorney may be cited for contempt. *Gallagher v. Municipal Court*, 31 Cal.2d 784, 797, 192 P.2d 905, 914 (1948). However, if such warnings have been given, a trial court may thereafter summarily hold an attorney in contempt for willful violation of the order and warning, because "[d]isobedience of court orders tends to lessen the effect of those orders." *Id.*

Contrary to this longstanding California authority, the Ninth Circuit in this case has held that even the willful disobedience of an order not to ask certain prejudicial questions after warnings not to do so cannot be summarily punished by contempt unless a reviewing court independently concludes that the attorney would continue to disobey the order unless she were immediately punished.

2. The Ninth Circuit has so far departed from the accepted and usual standard of review of state court contempt proceedings as to call for an exercise of this Court's supervisory power.

Sufficient deference was not given by the Ninth Circuit to the state trial court findings as required by 28

U.S.C. §2254(d). Although accepting the state trial court's findings that attorney Watson willfully disobeyed a court order after repeated warnings to other counsel in the case, and purporting to understand the trial court's concern that her questions might prejudice jurors in favor of her client, the Ninth Circuit, on the basis of its limited review of the record and without evidentiary hearing, simply disagreed that the trial judge's actions were required to prevent demoralization of the court's authority or to prevent further violations. The conclusion simply ignores the fact that Ms. Watson's violations followed the obvious insufficiency of earlier warnings rather than immediate punishment of the prior violations by the other attorneys in the case, including her own co-counsel.

Exercise of this Court's supervisory power is warranted because of the historical recalcitrance of the Ninth Circuit to give sufficient deference to state court findings. *See Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), where this Court took the Ninth Circuit to task for not giving sufficient deference to state court findings; and *Sumner v. Mata* (1982) 455 U.S. 591, 71 L.Ed.2d 480, 102 S.Ct. 1303, sending the same case back again for the same failure to give sufficient deference to the state court findings.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

De Witt W. Clinton
County Counsel

Frederick R. Bennett
Assistant County Counsel

APPENDIX

1. Opinion of the Court of Appeals, filed December 13, 1996.

Watson v. Block, 102 F.33d 433 (9th Cir. 1996)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PENELOPE WATSON, *Petitioner-Appellant,* v. SHERMAN BLOCK, Sheriff; DANIEL E. LUNGREN, Attorney General for the State of California; HON. WILLIAM R. POUNDERS, Judge of the Superior Court of the State of California for the County of Los Angeles, *Respondents-Appellants.*	No. 94-56346 D.C. No. CV-94-6012-RAG OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, District Judge, Presiding

Argued and Submitted
August 11, 1995 – Pasadena, California

Filed December 13, 1996

Before: James R. Browning, William A. Norris, and Stephen Reinhardt, Circuit Judges

Opinion by Judge Norris

SUMMARY

Criminal Law and Procedure/Contempt

The court of appeals reversed a judgment of the district court. The court held that a defense attorney's isolated reference during a months-long trial to the penalty faced by the defendant does not warrant the trial court's use of summary contempt procedure.

During a multi-defendant capital murder trial that lasted three months, appellant defense attorney Penelope Watson asked two questions of her client that referred to the penalty he faced (life without parole). Watson's asserted reason for the questions was to show her client's state of mind, rather than placing the question of punishment before the jury.

Without a hearing, the trial court determined that Watson has disobeyed an order of the court for counsel to refrain from making references to penalty and found her in contempt. The court sentenced Watson to two days in jail, to be served after conclusion of the trial.

The California appellate courts and the district court denied Watson's habeas corpus petitions. On appeal, Watson contended that her due process rights were violated because she did not have notice of the conduct prohibited by the trial court, and that she was entitled to a hearing to determine whether her conduct was willful.

[1] Due process requires that a person charged with contempt usually be given a hearing on the charges. Summary contempt proceedings are appropriate only for

a narrowly limited category of contempts. This category includes only charges of misconduct, in open court, where immediate punishment is essential to prevent demoralization of the court's authority before the public.

[2] Watson's two questions did not pose a threat to the orderly administratin of justice sufficient to justify summary contempt procedure. When viewed in the context of a three-month long trial, the two questions did not constitute such an open, serious threat to orderly procedure that instant and summary punishment was necessary. [3] The magnitude of the threat posed to the orderly administration of justice by Watson's questions paled in comparison with that posed by the conduct of attorneys whose summary contempt citations have been upheld by the court of appeals.

[4] Watson did not engage in a pattern of repeated violations that pervaded the courtroom and threatened the dignity of the court. She was held in contempt for asking two questions during a three-month trial. Nothing indicated that she showed disrespect for the court's authority at any other time, or that she would have repeated the references to punishment or engaged in other improper conduct unless she were immediately punished. The use of summary contempt procedure violated due process.

COUNSEL

Garrett J. Zelen, Los Angeles, California, for the petitioner-appellant.

Frederick R. Bennett, Assistant County Counsel, Los Angeles, California, for the respondents-appellees.

OPINION

NORRIS, Circuit Judge:

Attorney Penelope Watson appeals the denial of her habeas petition claiming that her due process rights were violated when she was held in summary contempt. We reverse.

Ms. Watson represented William Mora in a multi-defendant special circumstances murder trial that began on March 28, 1994, in Los Angeles Superior Court, Judge William R. Pounders presiding. On April 7, an attorney for one of Mora's codefendants repeatedly raised in open court the issue of the punishment the defendants would be eligible for should they be convicted. Calling counsel to the bench, Judge Pounders stated categorically that possible punishment "is not a subject open to discussion. It should not be explored." Ms. Watson remained at the defense table during this side bar; her cocounsel, Joseph Albert Gutierrez, was present on behalf of their client Mora.[1]

[1] At the post-verdict hearing on the contempt, Watson stated that she did not review the transcript of the bench conference.

On April 20, the attorney for a different codefendant again raised the issue of punishment. In response, Judge Pounders stated in open court:

> [T]he subject of sentencing of [the codefendant] is not part of the conversation. But more than that, it is prejudicial under [Cal.Code of Evidence, section] 352. It's not a subject the jury is entitled to discuss.
>
> This is not a death penalty case, so penalties are not something to discuss, and a penalty given to a juvenile involved in the same activity is something that would only serve to confuse.

On April 21, Ms. Watson's cocounsel Mr. Gutierrez asked a series of seven questions in which he stated that the defendants were "looking at life in prison." At side bar, which Ms. Watson did not attend, Judge Pounders told her cocounsel Mr. Gutierrez,

> You had an ulterior motive in bringing out the amount of time [the witness] spent [in prison], and I think it's to show the contrast between what he got and what your clients may be facing. . . . I'm saying that's the last time I want to hear anything about a sentence. . . . You've covered it. Do not cover it again. . . . I can only believe that you're doing it to persuade the jury about how serious the charges are and that's not something they're permitted to discuss, and you know that and we've already talked about it.

Although Ms. Watson was in the courtroom at the time of Mr. Gutierrez's examination and the bench conference it triggered, she remained at counsel table rather than going to the bench. Following the side bar, Mr. Gutierrez apologized in open court:

> MR. GUTIERREZ: Judge, I would just like the record to reflect that I apologize to this court for asking the question as to or informing this witness through my question that he served six months in jail and three years probation. It was my understanding that we couldn't go into the fact that he was convicted of 245, but I thought that it would be appropriate to bring out the time that he was sentenced and the probation that he had, and I obviously defied the Court Order, and I misunderstood the Court and I apologize.

In accepting this apology, Judge Pounders stated in open court:

> It's simply that punishment is not an issue for this jury to decide, and the more that counsel want to harp on this issue of punishment, the more inappropriate it becomes.

On June 21, while questioning her client on redirect examination, Ms. Watson asked "You've been in custody for four years?" After a question regarding the conditions of the incarceration, Ms. Watson asked, "And during that four years, you were facing the death penalty until just the day before we started." Judge Pounders sustained an objection and stated "We've already talked about this at side bar. Follow the court's admonitions." Immediately after this admonition to "follow the court's admonitions," Ms. Watson's next question of her client was, "You're facing life without the possibility of parole?"

Another side bar followed immediately. Judge Pounders asked Ms. Watson why he should not hold her in contempt for covering potential penalties after he had "at least twice ordered counsel not to cover [it]." She

explained that she was attempting to elicit from her client testimony that she thought was relevant. The complete colloquy was as follows:

> THE COURT: I would like to know why I should not hold you in contempt of court for having covered something that I've at least twice ordered counsel not to cover, which is the potential penalty faced by these defendants since it is not an issue for a jury determination.
>
> MS. WATSON: I think it goes to his state of mind as to why he would take this risk at this point in revealing that he was the person who called 911. . . .
>
> THE COURT: Is there any reason why you didn't want to raise this at side bar without the presence of the jury, recognizing that I have at least twice admonished counsel not to cover it? And especially your cocounsel Mr. Gutierrez, when he's gone into it, I admonished him not to do it further. Is there any reason why we couldn't discuss this before you brought it up?
>
> MS. WATSON: No. I wasn't at side bar with any of that involving Mr. Gutierrez, and I honestly thought it's the most relevant thing in the world to why he would say he called 911.
>
> THE COURT: You're in violation of a court order. You do not think that's relevant to anything?
>
> MS. WATSON: I didn't think it was.

At that point, Judge Pounders found Ms. Watson in contempt for violating section 1209(a)(5) of the California Code of Civil Procedure.[2] Judge Pounders stated:

> I do find you in contempt of court. A very clear violation of contempt of court in the direct hearing and presence of the court, and the appropriate punishment will have to be determined at the conclusion of this trial since I can't incarcerate you during the trial.
>
> I want everyone to understand when I issue an order, I plan to follow it up, and if you have any doubt about that, you're taking your own risk.

The next day, Judge Pounders issued a written order of contempt, finding that "the questions asked by contemnor . . . in the presence of the jury had as [their] sole purpose improperly advising the jury of the potential penalty for the defendants in violation of the court Order" and that the "contemnor was aware of the Order." Order of Contempt, dated June 22, 1994, at 8. The order imposed a two-day jail sentence to be served after trial.

On July 8, two days after Mora's case was submitted to the jury, Judge Pounders gave Ms. Watson a further opportunity to explain her conduct. She again explained that she believed her conduct was justified because the testimony she was attempting to elicit was relevant. According to her counsel:

---

[2] Section 1209(a)(5) of the California Code of Civil Procedure provides: "The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: . . . Disobedience of any lawful judgment, order, or process of the court."

> Miss Watson is not trying to say what she did was correct, but I want to show you what happened by way of implication of the thought process that was going on with her at the time.
>
> Yes, Mr. Gutierrez [discussed penalties] and there was an apology. . . . Miss Watson certainly was aware of that happening.
>
> What was being gone into at that moment by Miss Watson in her mind was a completely different type of issue. Not an issue of the penalty, not trying to get into the idea of getting before the jury what the possible punishment could be for the sympathy or prejudice value that it could have, but rather to understand why someone who potentially could face this – this terrible penalty would come forward with a 911 call . . . and it had to do with the motive and what was going on, the state of mind of the witness, meaning the defendant at that time in regard to the 911 call. . . .
>
> . . . [S]he believed there was a totally different set of circumstances that was not covered by the court's previous rulings or admonitions.
>
> . . .
>
> . . . Miss Watson was not in any way trying to be contemptuous of the court, ignoring of the court or disobeying of the court. In her mind, . . . she saw a totally different justification for bringing this forward, and she was not attempting in any way to try and get around the court's order or to disregard the court's order.

Judge Pounders found this explanation unconvincing, believing instead that Ms. Watson was trying to make the point to the jury that the murder victim, a gang

member, was not worth a life sentence for her client. Judge Pounders stated:

> Now, assuming, but I don't b[u]y the idea that she did not know I had issued an order before saying don't go into this, [the admonitions on June 21 were] a sufficient signal to anyone of reasonable intelligence, and I know her to be beyond that . . . to know that I've said don't do something. If she doesn't know what it is I've said don't do, the point is to go to side bar [for clarification].
>
> She didn't do that. She goes right into the next point, and again a leading question . . . she says, "You're facing life without possibility of parole" . . .
>
> . . .
>
> The only conclusion I can draw from that is her idea was it's more important to me as an attorney to see that this information goes to the jury. . . . I think she has permanently prejudiced this jury in favor of her client . . . They know the penalty he's facing . . . and they know that the person that was killed isn't worth that penalty, and so they are not going to find him guilty of the major charge.
>
> . . .
>
> . . . [G]enerally people do not hold the life of a gang member the same as they would a 13-year-old girl on her way to school that happens to be the accidental victim of the shooting instead of the gang member.
>
> And when the penalty is as extreme as this one is presented to the jury, I think that's a prejudice that cannot be overcome. . . .

> This is a very difficult case . . . for the prosecution. They don't have in this kind of a case much of a chance of getting a conviction when you're dealing with the same people that were involved in the activities . . . the beating and the burning of the victim, as the defendants have been, so it is a precarious balance that the prosecution is trying to maintain, and she upset the balance where there is nothing that can be done to correct it.
>
> . . . And I believe that the result is going to be that [the jury] will not find Mr. Mora guilty of the main offense, which is murder, that they may not find him guilty of much at all. . . .

Ms. Watson's habeas petitions to the California Court of Appeal and the California Supreme Court were denied. She now appeals the denial of her federal habeas petition.[3] Ms. Watson claims that her due process rights were violated because she did not have notice of the prohibited conduct. In addition, she argues that summary contempt procedure violated due process because the trial judge could not have known without a hearing whether or not her conduct was willful. *See, e.g., United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986) ("willfullness [sic] is an essential element of criminal contempt"). We do not address either of Ms. Watson's arguments because we hold that her conduct was not so disruptive as to justify the use of summary contempt procedure.

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[3] Although Ms. Watson has served her two-day sentence, her appeal is not moot because she remains at risk of being disciplined by the California State Bar, in part because of her contempt conviction. *Zal v. Steppe*, 968 F.2d 924, 926 (9th Cir.1992).

[1] Due process requires that a person charged with contempt usually be given a hearing on the charges against her. *In re Oliver*, 333 U.S. 257, 275 (1948) ("due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf"). Summary contempt proceedings are appropriate only for a "narrowly limited category of contempts." *Id.* This narrow category "includes only charges of misconduct, in open court, . . . where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *Id.*; *see also United States v. Wilson*, 421 U.S. 309, 316 (1975) (summary contempt appropriate when a refusal to comply with a court order "disrupts and frustrates an ongoing proceeding") (discussing Fed. R. Crim. P. 42(a)); *Harris v. United States*, 382 U.S. 162, 167 (1965) (summary contempt proceedings under Rule 42(a) only permissible in "those unusual situations . . . where instant action is necessary to protect the judicial institution itself"); *United States v. Engstrom*, 16 F.3d 1006, 1011 (9th Cir. 1994) ("Rule 42(a) may only be used when contempt poses a threat to the orderliness of ongoing proceedings, that is, when prompt action is required"); *United States v. Flynt*, 756 F.2d 1352, 1363 (9th Cir. 1985) (summary contempt proceedings under Rule 42(a) are justified when there is a need to "remedy a breakdown in the orderly operation of the judicial system"); *In re Gustafson*, 650 F.2d 1017, 1022 (9th Cir. 1981) (en banc) (trial court has discretion to invoke summary contempt procedures "when the contemnor's

conduct is 'such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures. . . . , [is] necessary' ") (quoting *Harris*, 382 U.S. at 165 (alteration in original); *United States v. Abascal*, 509 F.2d 752, 756 (9th Cir. 1975) ("the 'need for immediate penal vindication of the dignity of the court' is the basis for Rule 42(a)").

[2] Although we do not decide the issue whether Ms. Watson willfully disobeyed a court order, we can understand Judge Pounders' concern that her two questions might prejudice jurors in favor of her client by conveying the message that the life of a gang member was not "worth" life imprisonment for her young client. Nonetheless, we are not persuaded that these two questions posed a threat to the orderly administration of justice sufficient to justify summary contempt procedure. These two questions, when viewed in the context of a three-month long trial, did not constitute " 'such an open, serious threat to orderly procedure that instant and summary punishment was necessary,' " *Gustafson*, 650 F.2d at 1022 (quoting *Harris*, 382 U.S. at 165), given the "principle that only '[t]he least possible power adequate to the end proposed' should be used in contempt cases." *Wilson*, 421 U.S. at 319 (citation omitted).

[3] The magnitude of the threat posed to the orderly administration of justice by Ms. Watson's two questions pales in comparison with the magnitude of the threat posed by the conduct of attorneys whose summary contempt citations we have upheld. For instance, in *Gustafson*, the defense attorney "openly disregarded the Court's rulings and directives" during closing argument, 650 F.2d at 1023, ignoring at least nineteen admonitions to

slow down, *id.* at 1018, and engaging in "persistent argument on prohibited topics." *Id.* at 1020. In *Hawk v. Cardoza*, 575 F.2d 732 (9th Cir. 1978) (per curiam), we upheld summary contempt citations issued against defense counsel nineteen times. We held that "the necessary evidence of . . . actual obstruction" was established by "the trial judge's warnings to [the attorney], his special orders concerning conduct at trial issued before the trial began and [the attorney]'s continuing conduct and repeated violations of those orders." *Id.* at 735.

[4] Unlike the attorneys held in summary contempt in *Gustafson* and *Hawk*, Ms. Watson did not engage in a pattern of repeated violations that pervaded the courtroom and threatened the dignity of the court. She was held in summary contempt for asking two questions during the course of a three-month trial. Nothing in the record indicates that she showed any disrespect for the court's authority at any other time. Nor does anything in the record indicate that Ms. Watson would have repeated the references to punishment or engaged in any other improper conduct unless she were immediately punished. Accordingly, we hold that the use of summary contempt procedure in the circumstances of this case violated due process. *Cf. Abascal*, 509 F.2d at 754, 756 (holding that summary contempt procedure violated due process because, although "[a]ppellant defied a clear order directed to him personally by the court, . . . it does not appear that it was necessary for the court to order immediate incarceration").

The district court's order denying Ms. Watson's habeas petition is REVERSED, and the case is REMANDED for entry of judgment granting her petition.

2. *Watson v. Block*, unreported.

U.S. D.C., C.D. Cal. No. CV-94-6012 RG (CT)
(Sept. 8, 1994)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PENELOPE WATSON, Petitioner, v. SHERMAN BLOCK, SHERIFF OF THE COUNTY OF LOS ANGELES, et al., Respondents.	)	CASE NO. CV 94-6012 RG (CT) ORDER (Filed Sep. 8, 1994)

Petitioner applied to this Court for habeas corpus relief from an order of contempt, pursuant to 28 U.S.C. § 2254.

The Petition is hereby **DENIED**. The Court deems an evidentiary hearing, requested by Petitioner at argument, to be unnecessary. The record makes it quite clear that multiple statements made in open court gave Petitioner adequate warning to put a person of reasonable intelligence on notice as to what conduct Judge Pounders had prohibited, satisfying due process notice requirements. Petitioner's citation of *Ciraolo v. Madigan*, 443 F.2d 314 (9th Cir. 1971), is not persuasive – here all necessary elements of the contempt finding were within the personal knowledge of Judge Pounders, unlike the situation in *Ciraolo*.

The Petition for Writ of Habeas Corpus is **DENIED**. Execution of the judgment is hereby **STAYED** until close of business on Thursday, September 15, 1994.

IT IS SO ORDERED.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: September 8, 1994

3. *In re Watson,* unreported.

California Supreme Court Case No. S041016
(Aug. 25, 1994)

No. S041016

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE PENELOPE WATSON

ON

HABEAS CORPUS

(Filed Aug. 25, 1994)

Application for stay and petition for writ of habeas corpus DENIED.

/s/ Lucas
Chief Justice

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4. *In re Watson*, unreported.

California Court of Appeal, 2d App. Case No. B085378 (July 14, 1994)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 07/14/94

Garrett J. Zelen
12100 Wilshire Blvd.
Suite 1500
Los Angeles, CA. 90015

RE: Watson, Penelope
VS.

In Re: Penelope Watson On Habeas Corpus
2 Criminal B085378
Los Angeles No. BA018211

THE COURT:

The petition for writ of Habeas Corpus is denied.

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5. *In re Watson*, unreported.

L. A. Superior Court Case No. BA018211 (June 22, 1994)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In the Matter of PENELOPE WATSON	ORDER OF CONTEMPT (Filed Jun. 22, 1994)

ATTORNEY PENELOPE WATSON IS HEREBY JUDGED IN CONTEMPT OF COURT FOR ACTS COMMITTED IN THE IMMEDIATE VIEW AND PRESENCE OF THE COURT:

1. Contemnor appeared as counsel for Defendant Mora in a six-defendant dual simultaneous Special Circumstance murder trial in *People v. Martinez, et al.*, Case number BA 019211 in Department 101 of the Los Angeles Superior Court at 210 West Temple Street in Los Angeles, California. Her co-counsel was Joseph Albert Gutierrez. Trial began March 28, 1994.

2. Contemnor was warned along with all six of the other defense counsel not to offer evidence on the issue of penalty or punishment on April 7, 1994, when the Court ordered:

> " . . . under 352 that's far more prejudicial to suggest that these defendants were facing the death penalty and the district attorney decided

not to pursue it. That is not a subject that's open to discussion. It should not be explored."

(36 RT 8,181 – 6,182)

3. That warning to contemnor was repeated and explained several times in the following weeks:

April 7, 1994

"(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

MS. WALKER [prosecutor]: This is about the third time counsel has done it, and I started to object one time and I forgot to do it on the record.

He [James Epstein, counsel for codefendant Escobar] keeps talking about death and life without parole, and my concern is counsel is not doing that because that's what he really thinks what was said to this witness, it's because he wants the jury to know that's possibly what his defendants are facing, and he keeps saying it over and over, and they're not supposed to consider punishment, and I take it to be that's counsel's motivation, and that's why I'm objecting.

I don't mind any part of the question, but he keeps hammering on life without parole or death.

THE COURT: That's my impression as well.

. . .

. . . I do agree that your repetition of the possible punishment has more of an effect on advising the jury and keeping it in their minds

than in asking the question, so I sustain the objection. I think that's what you're doing."

(36 RT 6,175 – 6,177)

"MR. EPSTEIN: It shows that he was willing to commit perjury in a case where people were facing the death penalty. It certainly goes to his willingness to commit perjury in an extremely serious case.

THE COURT: No. And under 352 that's far more prejudicial to suggest that these defendants were facing the death penalty and the district attorney decided not to pursue it. That is not a subject open to discussion. It should not be explored."

(36 RT 6181 – 6182)

April 20, 1994

"(IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURIES:)

THE COURT: . . . So it's the whole on the same subject, and the subject of sentencing of Mr. Fernandez is not part of the conversation. But more than that, it is prejudicial under 352. It's not a subject the jury is entitled to discuss.

This is not a death penalty case, so penalties are not something to discuss, and a penalty given to a juvenile involved in the same activity is something that would only serve to confuse."

(43 RT 7,216)

April 21, 1994

"(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

MS. WALKER: People are going to make the same objection I made earlier with Mr. Epstein. I counted now it's been eight or nine times I think Mr. Gutierrez has referred to life as being told to him [Ricky Fernandez] by these officers, and I think we're getting way into the area of trying to let this jury know what these men are facing versus whether or not he was told this, and he's asked it about three or four times regarding this interview, two or three times now regarding this interview, and I anticipate he's going to ask it in the third one, and I think he's over emphasizing what these defendants are looking at. I ask that counsel stop that.

MR. GUTIERREZ: Judge, I didn't say life without parole. He said during the direct that the police told him that he'd be looking at life. I want to know if his statement to the police on June 6th is the product of free will, it's an honest recollection of events or is it the product of fear and duress.

If it is, the jury has a right to know so they can evaluate it and determine how much weight they're going to give that statement.

THE COURT: That's absolutely untrue, but why did you go into the sentence he actually received, which has nothing to do except to emphasis (sic) what he got and what your clients are facing.

. . .

. . . You had an ulterior motive in bringing out the amount of time he spent, and I think it's to show the contrast between what he got and what your clients may be facing, and you continue to say life.

If it were only the fact that you were emphasizing life, I would agree with you, but I don't believe you at this point. I think you have gone into it specifically to show exactly what I've described, that you're trying to show the contrast in the two sentences.

And I gratuitously complimented you on something when I said you wouldn't do what I told you not to do, and you've just done exactly that."

(43 RT 7,252 – 7254)

"[IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY]:

MR. GUTIERREZ: Judge, I would just like the record to reflect that I apologize to this court for asking the question as to or informing this witness through my question that he served six months in jail and three years probation. It was my understanding that we couldn't go into the fact that he was convicted of 245, but I thought that it would be appropriate to bring out the time that he was sentenced and the probation that he had, and I obviously defied the Court Order, and I misunderstood the court, and I apologize.

THE COURT: I accept the apology. It's more consistent with your reputation as I complimented you before you did it that you don't do things like that, and that's why I was

astounded that you did do it. But that's accepted. I understand. Mistakes can be made.

Its' simply that punishment is not an issue for this jury to decide, and the more that counsel want to harp on the issue of punishment, the more inappropriate it becomes."

(43 RT 7,290)

4. In the immediate view and presence of the Court on June 21, 1994, at approximately 3:30 p.m., contemnor asked the following questions of her client, Defendant William Mora, as he testified on redirect examination:

"Q. BY MS. WATSON: You've been in custody for four years?

A. Yes.

Q. And throughout this trial sometimes you've had to get up at 4:00 in the morning and not go to sleep until 10:00 at night?

MS. WALKER: Objection, Your Honor. Relevance.

THE COURT: Sustained.

Q. BY MS. WATSON: And during that four years, you were facing the death penalty until just the day before we started.

MS. WALKER: Your Honor, People are going to object.

THE COURT: Sustained.

MS. WALKER: Ask Miss Watson to be admonished and the Court –

THE COURT: Sustained. We've already talked about this at side bar. Follow the Court's admonitions.

Q. BY MS. WATSON: You're facing life without possibility of parole?

MS. WALKER: Your Honor, People object.

THE COURT: Objection sustained. See you at side bar, Miss Watson."

(RT 12,276)

5. Contemnor was given the opportunity to explain, give an excuse or apologize after the Court stated:

"THE COURT: I would like to know why I should not hold you in contempt of court for having covered something that I've at least twice ordered counsel not to cover, which is the potential penalty faced by these defendants since it is not an issue for a jury determination.

MS. WATSON: I think it goes to his state of mind as to why he would take this risk at this point in revealing that he was the person who called 911 when he and his lawyers have kept it a secret as much as possible, and evidently successfully so for the last four years.

And he's been attacked as to the fact this is a cover up, that this is a lie, that it's not him, and I think the fact that this is his whole life is certainly relevant to why he would take the risk that he's putting his family in, that he's putting himself in by saying this in open court, and this record is replete with the danger to people who turn on their neighborhood.

THE COURT: Is there a reason why you didn't want to raise this at side bar without the presence of the jury, recognizing that I have at least twice admonished counsel not to cover it? And especially your co-counsel, Mr. Gutierrez,

when he's gone into it, I admonished him not to do it further.

Is there a reason why we couldn't discuss this before you brought it up?

MS. WATSON: No. I wasn't at side bar with any of that involving Mr. Gutierrez, and I honestly thought it's the most relevant thing in the world to why he would say that he called 911.

THE COURT: You're in violation of a court order. . . . "

(RT 12,277 – 12,278)

6. The Court considered and weighed the explanation and as to the truthfulness, sincerity, or good faith of contemnor and finds that the questions asked by contemnor of Defendant Mora in the presence of the jury had as its sole purpose improperly advising the jury of the potential penalty for the defendants in violation of the court order. The Court further finds that contemnor was aware of the Order, at all times being present (a) at or immediately adjacent to all side bar conferences and (b) present in open court on April 7, 1994, when the initial warning was given, and (c) on April 20, 1994, when the warning was repeated in open court, and (d) on April 21, 1994, when co-counsel Mr. Gutierrez apologized in open court for defying that same order.

7. The Court adjudges contemnor guilty of contempt beyond a reasonable doubt for violation of section 1209 (a) (5) of the Code of Civil Procedure, disobedience of a lawful order of the court.

8. Good cause appearing, IT IS ORDERED that contemnor be committed to the custody of the sheriff to be held in the county jail for two days.

9. A STAY OF EXECUTION OF THIS SENTENCE is granted pursuant to section 128 (b) of the Code of Civil Procedure for three days following the submission of the case of People v. Mora to the jury, thereafter to be stayed until the conclusion of any petition for extraordinary relief filed by contemnor testing the lawfulness of the Order of Contempt.

10. A transcript of the contempt proceedings is attached to this Order.

Dated: June 22, 1994

/s/ William R. Pounders
JUDGE WILLIAM R. POUNDERS

[p. 12274] WILLIAM MORA,

THE DEFENDANT HEREIN RECALLED TO THE STAND AS A WITNESS IN HIS OWN BEHALF, HAVING BEEN PREVIOUSLY SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

REDIRECT EXAMINATION

BY MS. WATSON:

Q. ARE YOU STILL NERVOUS?

A. A LITTLE.

Q. TIRED?

A. KIND OF.

Q. WHERE YOU NERVOUS ON THE DAY THAT YOU TALKED TO THE POLICE?

A. YES.

Q. SCARED?

A. YES.

Q. LET'S TALK ABOUT THE 911 PHONE CALL TO START OFF WITH. YOU HEARD THE TAPE TODAY IN WHICH DETECTIVE LOPEZ SAYS ON PAGE 28 AND PAGE 38 AND I THINK OTHER PLACES TOO:

> "THINK ABOUT WHO MIGHT HAVE SAID WHAT AND WHY. NOW'S THE TIME TO SAVE YOURSELF. DON'T WORRY ABOUT SAVING ANYBODY ELSE, BECAUSE THEY DON'T HAVE A LITTLE GIRL, AND IF THEY

DO, THEY'RE THINKING ABOUT THEIR LITTLE GIRL AS WELL. SAVE [p. 12275] YOURSELF RIGHT NOW. YOU'VE GOTTA START THINKING ABOUT YOURSELF."

WHY DIDN'T YOU TELL HIM THAT YOU HAD TRIED TO HELP THE 18TH STREETER AND CALLED 911?

A. I DIDN'T WANT – I DIDN'T WANT TO GET ANYBODY IN TROUBLE MORE, AND I DIDN'T WANT NO PROBLEMS.

Q. FOR YOURSELF AS WELL?

A. YES.

Q. AND THAT COULD CAUSE PROBLEMS FOR YOU IF PEOPLE KNEW YOU DID THAT?

A. YES.

Q. DID YOU TELL SOMEONE?

A. ABOUT?

Q. THE 911 PHONE CALL EVENTUALLY.

A. YES.

Q. WHO DID YOU TELL?

A. MR. GUTIERREZ.

Q. AND WHEN DID YOU TELL HIM?

A. MAYBE A YEAR, YEAR AND A HALF AFTER I WAS IN CUSTODY.

Q. OKAY. AND DURING THAT YEAR, YEAR AND A HALF, DID YOU SEE BOTH MR. GUTIERREZ AND MYSELF ALMOST EVERY WEEK?

A. YES.

Q. WE TALKED ABOUT THE CASE, RIGHT?

A. YES.

Q. AND YOU NEVER TOLD EITHER ONE OF US THAT BEFORE ALMOST A YEAR AND A HALF?

[p. 12276] A. NO.

Q. WHY ARE YOU TELLING US TODAY?

A. BECAUSE IT'S SERIOUS, BECAUSE IT COST ME A LOT, MY FAMILY, MY GIRLS, EVERYTHING.

Q. YOU'VE BEEN IN CUSTODY FOR FOUR YEARS?

A. YES.

Q. AND THROUGHOUT THIS TRIAL SOMETIMES YOU'VE HAD TO GET UP AT 4:00 IN THE MORNING AND NOT GO TO SLEEP UNTIL 10:00 AT NIGHT?

MS. WALKER: OBJECTION, YOUR HONOR, RELEVANCE.

THE COURT: SUSTAINED.

Q. BY MS. WATSON: AND DURING THAT FOUR YEARS, YOU WERE FACING THE DEATH PENALTY UNTIL JUST THE DAY BEFORE WE STARTED.

MS. WALKER: YOUR HONOR, PEOPLE ARE GOING TO OBJECT.

THE COURT: SUSTAINED.

MS. WALKER: ASK MISS WATSON TO BE ADMONISHED AND THE COURT –

THE COURT: SUSTAINED. WE'VE ALREADY TALKED ABOUT THIS AT SIDE BAR. FOLLOW THE COURT'S ADMONITIONS.

Q. BY MS. WATSON: YOU'RE FACING LIFE WITHOUT POSSIBILITY OF PAROLE?

MS. WALKER: YOUR HONOR, PEOPLE OBJECT.

THE COURT: OBJECTION SUSTAINED. SEE YOU AT SIDE BAR, MISS WATSON.

[p. 12277] (THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: I WOULD LIKE TO KNOW WHY I SHOULD NOT HOLD YOU IN CONTEMPT OF COURT FOR HAVING COVERED SOMETHING THAT I'VE AT LEAST TWICE ORDERED COUNSEL NOT TO COVER, WHICH IS THE POTENTIAL PENALTY FACED BY THESE DEFENDANTS SINCE IT IS NOT AN ISSUE FOR A JURY DETERMINATION.

MS. WATSON: I THINK IT GOES TO HIS STATE OF MIND AS TO WHY HE WOULD TAKE THIS RISK AT THIS POINT IN REVEALING THAT HE WAS THE PERSON WHO CALLED 911 WHEN HE AND HIS LAWYERS HAVE KEPT IT A SECRET AS MUCH AS POSSIBLE, AND EVIDENTLY SUCCESSFULLY SO FOR THE LAST FOUR YEARS.

AND HE'S BEEN ATTACKED AS TO THE FACT THIS IS A COVER UP, THAT THIS IS A LIE, THAT IT'S NOT HIM, AND I THINK THE FACT THAT THIS IS HIS WHOLE LIFE IS CERTAINLY RELEVANT TO WHY HE WOULD TAKE THE RISK THAT HE'S PUTTING HIS

FAMILY IN, THAT HE'S PUTTING HIMSELF IN BY SAYING THIS IN OPEN COURT, AND THIS RECORD IS REPLETE WITH THE DANGER TO PEOPLE WHO TURN ON THEIR NEIGHBORHOOD.

THE COURT: IS THERE A REASON WHY YOU DIDN'T WANT TO RAISE THIS AT SIDE BAR WITHOUT THE PRESENCE OF THE JURY, RECOGNIZING THAT I HAVE AT LEAST TWICE ADMONISHED COUNSEL NOT TO COVER IT? AND ESPECIALLY YOUR CO-COUNSEL, MR. GUTIERREZ, WHEN HE'S GONE INTO IT, [p. 12278] I ADMONISHED HIM NOT TO DO IT FURTHER.

IS THERE A REASON WHY WE COULDN'T DISCUSS THIS BEFORE YOU BROUGHT IT UP?

MS. WATSON: NO, I WASN'T AT SIDE BAR WITH ANY OF THAT INVOLVING MR. GUTIERREZ, AND I HONESTLY THOUGHT IT'S THE MOST RELEVANT THING IN THE WORLD TO WHY HE WOULD SAY THAT HE CALLED 911.

THE COURT: YOU'RE IN VIOLATION OF A COURT ORDER. YOU DO NOT THINK THAT'S RELEVANT TO ANYTHING?

MS. WATSON: I DIDN'T THINK IT WAS.

THE COURT: I ADMONISHED ALL COUNSEL NOT TO GO INTO THIS SEVERAL TIMES. MISS WALKER HAS ASKED THAT WE NOT COVER IT. I'VE LISTENED TO EVERYBODY ON THE SUBJECT AND RULED THAT IT WAS NOT RELEVANT FOR THE JURY DETERMINATION.

I DO FIND YOU IN CONTEMPT OF COURT. A VERY CLEAR VIOLATION OF CONTEMPT OF COURT IN THE DIRECT HEARING AND PRESENCE OF THE COURT, AND THE APPROPRIATE PUNISHMENT WILL HAVE TO BE DETERMINED AT THE CONCLUSION OF THIS TRIAL SINCE I CAN'T INCARCERATE YOU DURING THE TRIAL.

I WANT EVERYONE TO UNDERSTAND WHEN I ISSUE AN ORDER, I PLAN TO FOLLOW IT UP, AND IF YOU HAVE ANY DOUBT ABOUT THAT, YOU'RE TAKING YOUR OWN RISK.

MR. GUTIERREZ: I WOULD JUST POINT OUT, YOUR HONOR, THAT DURING THE COURSE OF THIS TRIAL WHENEVER I'VE HANDLED A WITNESS, OR WE HAD AN AGREEMENT, MISS WATSON WOULD REMAIN AT COUNSEL TABLE NEXT TO MR. MORA [p. 12279] SO HE WOULDN'T CONVERSE WITH ANY OF THE OTHER DEFENDANTS, BECAUSE SOMETIMES THE DEFENDANTS SEEM TO TALK TO EACH OTHER WHENEVER WE'RE AT SIDE BAR.

SO I HANDLED BASICALLY THE PROSECUTION'S CASE. I CROSS-EXAMINED ALMOST ALL OF THE PROSECUTION WITNESSES, ESPECIALLY THE INFORMANTS, SO ANY KIND OF ADMONITION AT THE SIDE BAR MISS WATSON WAS NOT PRIVY TO BECAUSE SHE WAS SITTING DOWN, AND DURING MOST OF THIS TRIAL WHEN SHE WAS PRESENTING THE DEFENSE SIDE OF THE WITNESSES, I WOULD REMAIN SEATED WITH MR. MORA AND LET HER APPROACH AT SIDE BAR CONFERENCES.

SO I DO RECALL THAT THERE WAS A TIME WHEN THE COURT ADMONISHED ME REGARDING CASPER, AND I HAD INDICATED, THE COURT TOLD ME NO LONGER TO GO INTO IT, I BELIEVE OTHER LAWYERS HAD GONE INTO IT. I THINK MR. EPSTEIN HAD GONE INTO IT, AND THE COURT SAID ENOUGH PEOPLE HAVE GONE INTO IT, DON'T GO INTO IT ANYMORE, AND THE COURT ADMONISHED ME.

BUT WHEN THE COURT ADMONISHED ME, WE WERE AT THE SIDE BAR AND MISS WATSON WAS SEATED, SHE WAS NOT UP HERE AT BENCH AT THAT TIME, AND I REALLY DIDN'T RELAY THAT ADMONITION TO HER.

THE COURT: I THINK THE INCIDENT IN WHICH WE HAD, IN WHICH YOU HAD TO APOLOGIZE TO THE COURT FOR DOING THIS VERY THING WAS IN AN OPEN AND PUBLIC PROCEEDING, AND I'LL FIND IT IN THE TRANSCRIPT, BUT IT'S HAPPENED AT LEAST TWICE.

MS. WALKER: IT WAS ON THE RECORD.

[p. 12280] MR. GUTIERREZ: SUBSEQUENTLY I APOLOGIZED TO THE COURT AT SIDE BAR, AND THEN DURING THE BREAK IN OPEN COURT I WAS SEATED – I WAS STANDING AND WAS GOING TO RESUME MY CROSS AND I APOLOGIZED TO THE COURT. I INDICATED TO THE COURT THAT I THOUGHT I COULDN'T GO INTO WHAT HE WAS CONVICTED OF, NOT HOW MUCH TIME HE SERVED.

AND BASICALLY WHAT I WAS ASKING HIM, I SAID ISN'T IT TRUE THAT YOU'VE SERVED YOUR SIX

MONTHS AND YOUR THREE YEARS PROBATION AND YOU'RE NO LONGER, OR SOMETHING TO THAT EFFECT. AND THAT'S WHEN THE COURT BECAME UPSET THAT I HAD ASKED THAT QUESTION.

AND THEN AS A SIDE ISSUE, THE COURT INDICATED AT THE SIDE BENCH THAT I COULD NOT GO INTO THE PENALTIES, THAT I'VE ALWAYS REFERRED TO LIKE WITHOUT PAROLE, I WAS REFERRING TO THAT A FEW TIMES. I THINK OTHER LAWYERS HAD REFERRED TO IT, AND THE COURT SAID THAT'S ENOUGH ABOUT GOING INTO LIFE WITHOUT PAROLE. THAT WAS AT THE SIDE BAR.

MY APOLOGY TO THE COURT WAS THE QUESTION HE HAD SERVED SIX MONTHS AND THREE YEARS PROBATION. I THOUGHT THAT THE COURT HAD RESTRICTED ME FROM GOING INTO WHAT HE WAS CONVICTED OF, WHICH WAS A 245, AN ASSAULT, NOT THE TIME THAT HE HAD SERVED, BECAUSE EVEN MISS WALKER BROUGHT OUT THE FACT THAT HE WAS NO LONGER ON PROBATION IN CROSS-EXAMINATION OR DIRECT EXAMINATION TO SHOW THAT PERHAPS NOW HE'S WILLING TO SAY WHATEVER HE SAYS OR EXONERATE HIS HOMEBOYS BECAUSE HE'S NO [p. 12281] LONGER ON PAROLE OR PROBATION FROM THE JUVENILE PROCEEDINGS.

BUT MOST OF WHAT THE COURT HAD ADMONISHED ME ABOUT, PRIMARILY WHAT I DID THAT UPSET THE COURT WAS BRING OUT THE FACT THAT HE HAD SERVED SIX MONTHS AND THREE YEARS PROBATION, AND THE COURT APPARENTLY HAD

INDICATED YOU COULDN'T GO INTO THE TIME HE SERVED. IT WAS MY UNDERSTANDING WE COULDN'T GO INTO WHAT HE WAS CONVICTED OF.

THE COURT: I DON'T THINK YOUR MEMORY IS CORRECT ON ALL OF THE SUBJECTS EITHER, BUT IN ANY CASE, MISS WATSON IS NO MORE THAN SIX FEET AWAY FROM US WHEN WE'RE AT THE SIDE BAR CONFERENCE. SHE'S AT THE END OF THE CENTER TABLE CLOSEST TO THE BENCH AND ONLY A MATTER OF FEET AWAY.

I DO NOT FIND IT POSSIBLE THAT SHE DID NOT, WAS NOT AWARE OF THE COURT ORDER, AND I WILL FIND IT IN THE TRANSCRIPT, EVEN THOUGH WE'VE GOT THOUSANDS OF PAGES, AND PROVIDE A WRITTEN ORDER.

BUT I DO FIND HER IN CONTEMPT AT THIS TIME. I DON'T KNOW HOW ANYONE CAN UNDERSTAND THAT IT IS FAIR GAME TO TALK ABOUT THE PENALTY IN THIS CASE, AND IT IS A SERIOUS MATTER. THAT IS SUFFICIENT FOR MR. MORA TO REALIZE HOW IMPORTANT THIS PROCEEDING IS.

WE SPENT A TREMENDOUS AMOUNT OF TIME ON IT. THERE IS NO WAY THE JURY COULD NOT UNDERSTAND WITH 50 PEOPLE IN THIS COURTROOM HOW IMPORTANT THIS PROCEEDING IS, AND SOMEBODY HAS DIED. THAT MAKES IT A [p. 12282] VERY IMPORTANT PROCEEDING AS WELL.

SO I DON'T ACCEPT THE EXCUSES THAT HAVE BEEN GIVEN, AND I WILL PROVIDE A WRITTEN ORDER. WE WILL TAKE UP THE ISSUE OF THE

APPROPRIATE PUNISHMENT AT THE CONCLUSION OF THE TRIAL.

WHAT ELSE DO WE NEED TO DO?

MS. WALKER: I'D ASK THAT THE COURT INSTRUCT THE JURY THAT THE SUBJECT OF PENALTY IS INAPPROPRIATE, THAT THEY SHOULD NOT THINK ABOUT IT, AND I MEAN I HATE TO RING THE BELL AGAIN, BUT I THINK IT HAS TO BE SAID THIS WAS AN IMPROPER AREA, IT SHOULD NOT HAVE BEEN BROUGHT UP IN FRONT OF THEM AND IN STRONG WORDS.

THE COURT: I'M GOING TO INDICATE THAT I INSTRUCTED ALL COUNSEL NOT TO COVER THIS AREA. IT IS NOT A CONSIDERATION FOR THE JURY AND WHAT WAS DONE WAS IN DIRECT VIOLATION OF MY ORDER.

MS. WALKER: THANK YOU.

MR. GUTIERREZ: YOUR HONOR, I WOULD POINT OUT THOUGH THERE WERE TIMES WHERE EVEN I BELIEVE MR. PRANSKY, MR. EPSTEIN WENT INTO PUNISHMENT, AND THERE WERE PORTIONS WHERE I WENT INTO DURING CASPER'S TESTIMONY, BETHANCOURT'S TESTIMONY THAT WAS NOT OBJECTED TO NOR STRICKEN FROM THE RECORD. THAT'S PART OF THE RECORD.

OF COURSE, WE COULD COMMENT ON EVIDENCE THAT'S BEEN PRESENTED DURING THE COURSE OF THE TRIAL BUT WAS NEVER OBJECTED TO. FOR EXAMPLE, BETHANCOURT SAYING HE WAS

LOOKING AT PRISON OR LIFE IN PRISON, [p. 12283] THINGS OF THAT SORT.

MS. WALKER: NO. COUNSEL KEPT, IS SPECIFICALLY REMEMBER ALL THIS. I HAD TO EVENTUALLY COME UP AND OBJECT, AND I WAS TRYING TO KEEP FROM OBJECTING IN FRONT OF THE JURY.

AS COUNSEL, MR. EPSTEIN, DID AT FIRST, THEN MR. GUTIERREZ STARTED DOING IT AND I THINK MR. PRANSKY DID IT TIME AND TIME AGAIN TRYING TO SHOW THAT IT WAS LIFE WITHOUT PAROLE OR A POSSIBLE DEATH CASE WITH ALL THE WITNESSES, AND I DID OBJECT, AND THAT'S HOW COME ALL COUNSEL KNOW ABOUT IT IS – THE COURT KNOWS ALL COUNSEL KNOW ABOUT IT BECAUSE IT HAPPENED ON MORE THAN TWO OCCASIONS.

THE COURT: YES.

MS. WALKER: IT'S ABSURD TO THINK THAT MISS WATSON DIDN'T KNOW WHAT SHE WAS DOING.

MR. MURPHY: YOUR HONOR, CAN I SAY SOMETHING IN MITIGATION?

THE COURT: I WANT TO MAKE IT CLEAR IF THIS HAD BEEN DONE AT SIDE BAR, I WOULD NOT HAVE PERMITTED THE QUESTION. IT DOES NOT GO TO MR. MORA'S STATE OF MIND ANYMORE THAN THE SIGNIFICANCE OF BEING A DEFENDANT IN A MURDER CASE. THAT WAS SUFFICIENT TO ARGUE WHATEVER POINT THE DEFENSE NEEDED TO ARGUE. AND I THINK THIS GOES AGAIN DIRECTLY

TO THE POINT OF PLEADING TO THE JURY FOR SYMPATHY BASED ON THE PUNISHMENT THAT MAY BE METED OUT IN THIS CASE.

MR. MURPHY: I JUST WANTED TO SAY SOMETHING IN [p. 12284] MITIGATION ON BEHALF OF MISS WATSON THAT I DON'T WANT TO FORGET BECAUSE I KNOW THE PROCEEDINGS WILL BE AT THE END OF THESE PROCEEDINGS, BUT I THINK ONE OF THE FACTORS IS WHEN THE PROSECUTING ATTORNEY WAS QUESTIONING MR. MORA, I GUESS IT WAS ON CROSS, SHE ASKED THE FOLLOWING QUESTION, WHEN YOU MADE THIS STATEMENT TO DETECTIVE LOPEZ, YOU DIDN'T HAVE A LAWYER AT THAT TIME, DID YOU?

AND I WAS WONDERING WHAT RELEVANCE, OF COURSE, I'M NOT GOING TO OBJECT ON THE GROUNDS OF IRRELEVANT, IT DOESN'T EVEN PERTAIN TO MR. SANCHEZ, AND I'M WONDERING WHY SHE WOULD ASK A QUESTION LIKE THAT, WHAT DIFFERENCE DOES IT MAKE. IS THE IMPLICATION SUPPOSED TO BE THAT SINCE AFTER YOU'VE BEEN APPOINTED AN ATTORNEY, THEN YOUR TESTIMONY WAS CONSTRUCTED OR SOMETHING? THAT'S HONESTLY WHAT WENT THROUGH MY MIND.

WHY AM I SAYING THIS NOW? WELL, ONE, I DON'T WANT TO FORGET TO SAY IT. I THINK, AND THIS IS THE STATEMENT I MADE FOR THE RECORD, THAT IT ENTERED INTO MISS WATSON'S MIND IN ASKING THE QUESTION THAT SHE DID. I THINK THIS WAS AFTER THIS QUESTION WAS ASKED BY

THE DISTRICT ATTORNEY, AND I THINK IT'S A FACTOR THAT THE COURT SHOULD CONSIDER.

I THINK SHE WAS TRYING TO DO SOMETHING ABOUT THAT QUESTION, WHICH I CONSIDER WAS IMPROPER ON THE PART – I DON'T SEE WHY – WHY IT'S IMPORTANT, WHY THAT QUESTION SHOULD HAVE BEEN ASKED, ALTHOUGH I DIDN'T MAKE ANY OBJECTION. I THINK THAT ENTERED INTO IT.

[p. 12285] I THINK THAT'S – THAT WAS PART OF THE REASON FOR THE QUESTIONING BY MISS WATSON ON REDIRECT.

MS. WALKER: WELL, YOUR HONOR, I'D ASK THAT COUNSEL BE PROHIBITED FROM GIVING AMICUS REASONS TO MISS WATSON FOR HER BLATANT VIOLATION OF THE ORDER. IT'S RIDICULOUS.

MR. EPSTEIN: I'D LIKE TO MAKE A STATEMENT. WHEN I CROSS-EXAMINED BETHANCOURT, IT WAS CLEAR THAT BETHANCOURT AVOIDED PROSECUTION IN THIS CASE BY BEING MADE A WITNESS INSTEAD OF PROSECUTED.

IF HE'S NOT AN ACCOMPLICE AS A MATTER OF LAW, MISS WATSON HAS CERTAINLY ALMOST CONCEDED THAT THE JURY MAY WELL FIND HIM AN ACCOMPLICE AND ASK FOR INSTRUCTIONS TO PROTECT THE RECORD ON APPEAL IN CASE HE'S FOUND TO BE AN ACCOMPLICE IN THIS CASE.

THE FACT THAT MR. BETHANCOURT AVOIDED PROSECUTION BY BECOMING A WITNESS AND THE FACT THAT HIS TESTIMONY HAS VERY MUCH BEEN IMPEACHED EXTRAORDINARILY IN THIS TRIAL, THE

DEFENSE HAD AN ABSOLUTE RIGHT TO SHOW WHAT MR. BETHANCOURT WAS AVOIDING IN TERMS OF POTENTIAL PENALTY FOR BECOMING A WITNESS IN THIS CASE AND TESTIFYING IN THIS CASE, AND THAT'S WHY WHEN I WAS CROSS-EXAMINING BETHANCOURT, I ATTEMPTED TO BRING OUT THE FACT THAT HE KNEW, HE WAS TOLD BY THE OFFICERS THAT HE WAS FACING EITHER THE DEATH PENALTY OR LIFE WITHOUT POSSIBILITY OF PAROLE AND THAT DID COME OUT, SO THAT WAS ALREADY BEFORE THE JURY.

IT'S ALREADY IN THE TRANSCRIPT THE FACT [p. 12286] THAT I ASKED MR. BETHANCOURT ISN'T IT A FACT YOU WERE TOLD YOU WERE FACING LIFE WITHOUT POSSIBILITY OF PAROLE.

MS. WALKER: AND HE SAID NO.

THE COURT: THERE WERE SEVERAL TIMES THAT THE ISSUE OF PUNISHMENT CAME UP AND USUALLY IT RESULTED IN A SIDE BAR CONFERENCE IN WHICH I REITERATED THE ORDER THAT COUNSEL NOT GO INTO IT.

AND EVEN IF YOU BELIEVE IT'S APPROPRIATE ON CROSS-EXAMINATION OR TO IMPEACH WITNESSES, IT SHOULD HAVE BEEN BROUGHT UP AGAIN AT SIDE BAR IF YOU THINK THE CIRCUMSTANCES HAVE CHANGED.

I ISSUED A DIRECT ORDER THE LAST TIME, IT'S IN THE RECORD, AND I WILL FIND IT IN PREPARING A WRITTEN ORDER OF CONTEMPT. I AM ONLY DELAYING THE QUESTION OF PENALTY OR PUNISH

PUNISHMENT TO GIVE MISS WATSON A CHANCE TO REVIEW THE RECORD FOR HERSELF AND EXPLAIN HER CIRCUMSTANCES AT THE TIME, AND I DON'T BELIEVE AN APPROPRIATE PUNISHMENT AT THIS POINT, INTERRUPTING THE TRIAL, IS THE BEST COURT TO TAKE.

BUT SINCE THERE'S BEEN A CHALLENGE TO WHAT I'M SAYING, THAT EVERYONE HEARD THAT IT WAS CLEAR IN THE RECORD MORE THAN ONCE, I'M GOING TO DELAY THE QUESTION OF THE SANCTION TO BE APPLIED IN THIS CASE. WE'VE GOT TO MOVE ON.

[p. 12287] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURIES:)

MS. WATSON: SHALL I BEGIN?

THE COURT: NO. I HAVE AN INSTRUCTION TO GIVE, AND I'M LOOKING FOR AN APPROPRIATE PART. I THINK WE COVERED IT IN THE QUESTIONNAIRE, BUT I WANT TO MAKE SURE.

OKAY. IN ANY CASE, I WANT TO DIRECT BOTH JURIES TO DISREGARD THE QUESTIONS AND ANSWERS GIVEN REGARDING THE POSSIBLE PENALTY IN THIS CASE. THE PENALTY IS NOT A DETERMINATION FOR THE JURY. I'VE INSTRUCTED THE ATTORNEY'S NOT TO QUESTION ON THIS SUBJECT AND MS. WATSON VIOLATED THAT ORDER. IT WAS A DIRECT ORDER FOR NO DISCUSSION TO BE MADE ON THIS SUBJECT.

I VIEW IT AS AN APPEAL TO SYMPATHY ON YOUR PART, AND I DIRECT YOU TO DISREGARD IT. THE QUESTION OF PENALTY OR PUNISHMENT IS ONE ONLY FOR THE COURT IN A CASE THAT DOES NOT INVOLVE THE DEATH PENALTY. ALL RIGHT.

MISS WATSON, YOU MAY PROCEED.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 101 HON. WILLIAM R. POUNDERS, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. MANUEL CRUZ MARTINEZ, ARTURO SANCHEZ, EDGAR ESCOBAR, LUIS ESTUARDO JOFRE, WILLIAM MORA AND JOSEU LYSSES FUNES AKA JOSE ULYSSES ORTIZ, DEFENDANTS.	NO. BA018211 REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, JEANNE C. IANNONE, CSR #3140, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 12,274 THROUGH 12,287, COMPRISE A PARTIAL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD AND TESTIMONY TAKEN IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON TUESDAY, JUNE 21, 1994.

DATED THIS 22ND DAY OF JUNE, 1994

/S/ Jeanne C. Iannone CSR #3140
JEANNE C. IANNONE,
OFFICIAL REPORTER

Constitutional and Statutory Provisions

United States Constitution, Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. §2254, subdivision (d):

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written

opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided hereinafter, and the Federal court on a consideration of such part of the record as a

whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, or otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

California Code of Civil Procedure §1209, subdivision (5) provides in pertinent part:

(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

* * * *

5. Disobedience of any lawful judgment, order, or process of the court.

California Code of Civil Procedure §1211 provides:

(a) When a contempt is committed in the immediate view and presence of the court, or of

the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers.

(b) Filing of the Judicial Council form entitled 'Order to Show Cause and Affidavit for Contempt (Family Law)' shall constitute compliance with this section."

California Code of Civil Procedure §1218, subdivision (a) provides:

"(a) Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he or she is guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars ($1,000), or he or she may be imprisoned not exceeding five days, or both. In addition, a person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred

by this party in connection with the contempt proceeding."

California Code of Civil Procedure §1222 provides:

"The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive."

Supreme Court, U.S.
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CLERK

No. 96-1383

In The

Supreme Court of the United States

October Term, 1996

WILLIAM POUNDERS, Judge of the Superior Court of the State of California for the County of Los Angeles,

Petitioner,

vs.

PENELOPE WATSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I

INTRODUCTION

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Ninth Circuit. The Court of Appeals opinion is reported at 102 F.3d 433 (and was appended to the Petition for Writ of Certiorari). Petitioner, in that Petition, seeks certiorari from the final judgment of the United States Court of Appeals for the Central Ninth Circuit entered on December 13, 1996 (an order granting Respondent Watson's appeal of a denial of her Petition for Writ of Habeas Corpus in the United States District Court). Petitioner, Judge William Pounders of the California Superior Court, had sentenced Respondent (a criminal defense attorney) to two days in custody and she has served her two day sentence in the custody of the Sheriff of the County of Los Angeles, on September 16 through September 17, 1994, and is currently not in custody. She received a notice from the State Bar of California indicating that an investigation has begun with possible disciplinary consequences in regard to her ability to practice law related to her having been found in contempt by the Los Angeles County Superior Court.

The alleged contempt arose in the context of a murder trial in which Respondent's client had previously faced the death penalty, and now faced a potential sentence of life without the possibility of parole. Respondent's client was testifying that he had been the individual who has called "911" to report the burning of the victim. The client was revealing this information for the first time to anyone except his attorneys during the questioning by Respondent-Attorney, who was attempting to establish the client's motivation for having withheld these facts. Respondent was one of two attorneys representing her client in that trial.

Respondent, in her appeal to the Ninth Circuit Court of Appeals raised the United States constitutional issue of notice

and due process in that Respondent received no actual notice nor had no actual knowledge of the alleged admonition(s) by Los Angeles Superior Court Judge Pounders (which was/were made outside of her presence and to other attorneys on the case) and thus, the judgment and conviction of contempt for violation of said admonition(s) violated Respondent's right to due process pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. *Picard v. Connor,* 404 U.S. 270, 275 (1971).

STATEMENT OF JURISDICTION

The Supreme Court could assert jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent Penelope Watson, an attorney, was charged with direct contempt by a judge of the Los Angeles County Superior Court. Respondent respectfully opposes the Petition for Writ of Certiorari for numerous reasons, not the least of which is that the unanimous decision by the United States Court of Appeals for the Ninth Circuit was so narrowly construed, without even reaching the full import of Respondent's due process argument, as to leave little or no room for reasonable minds to differ. Unfortunately, Petitioner fails to include highly material and relevant facts in his statement of the case bearing on the issues decided below.

For example, Petitioner's summary of the case includes this incomplete, and thus misleading rendering of the facts:

> On April 7, 1994, an attorney for one of the co-defendant's in open court repeatedly raised the issue of the punishment the defendants faced. The trial judge stated categorically that possible punishment "is not

> a subject open to discussion. It should not be explored." On April 20, the attorney for a different co-defendant again raised the issue of punishment, and the trial judge stated again that such questioning is prejudicial and is not to be discussed. On April 21, Ms. Watson's co-counsel asked a series of seven questions in which he stated that the defendants were "looking at life in prison." At side bar, the trial judge told Ms. Watson's co-counsel that the matter was not to be discussed again.
>
> On June 21, 1994, Ms. Watson asked a question of her client that referred to the penalty he faced (life without parole). The trial judge warned her to follow the court's prior admonishments that the subject of prior punishments was not to be explored. Ms. Watson's next question of her client was, "You're facing life without the possibility of parole?"

(Petition at 2-3). Ms. Watson was then held in contempt by the court for failing to follow the court's previous admonishments to other counsel regarding possible punishment of the defendants. The question she had asked her client dealt with the effect of, having faced the death penalty until the beginning of trial, why her client had not revealed this information incriminating other defendants until that testimony.

What Petitioner fails to inform this Court is that Ms. Watson had no knowledge of the previous admonishments to other counsel. Ms. Watson had been ordered not to duplicate any efforts of her co-counsel, including reading transcripts of his

examinations (and thus reported bench conferences). She was not present at bench conferences which her co-counsel attended, and was not present at bench conferences in which any other attorney for co-defendants had been warned, admonished, or ordered regarding the use of information regarding possible punishment. Respondent had **no knowledge** of the court's orders. Further, Petitioner neglects to tell this Court the trial judge convicting Respondent of direct summary contempt had no facts before him demonstrating any knowledge by Respondent of the court's relevant orders.

Respondent was held in direct summary contempt for asking two questions, in the course of a three-month long murder trial. After the first question, Respondent was told to follow the court's previous admonitions (at which the giving of said admonitions Respondent was not present; Petitioner **could not and did not demonstrate any facts to the contrary,** although the issue was raised at the hearing after the finding of contempt), and after the second and rephrased question Respondent was held in contempt. The court did not ask if Respondent was aware of the admonitions given to others outside her presence. The questions were not disruptive, violent, abusive, nor threatening the dignity nor control of the court.

What then, was the urgent necessity for summary contempt? Could not a less onerous procedure be employed when no threat to the court was imminent? This is exactly what the Court of Appeals found; there was no reason, let alone necessity, for direct summary contempt given these facts. The Court of Appeals decision squarely found that summary contempt procedure in the circumstances of this case violate due process (Court of Appeals decision at App. 14 of Petitioner's brief).

While Petitioner attempts to capture the Court's attention with entreaties to the specter of federal court interference with

state court authority, half-truths and distortions are not appropriate.

REASONS FOR DENYING THE WRIT

What the unanimous decision of the Court of Appeals held was that the conduct of Respondent (without deciding whether Respondent willfully disobeyed a court order) in two isolated questions over a three-month long trial "did not constitute such an open, serious threat to orderly procedure that instant and summary punishment was necessary, given the principle that only [t]he least possible power adequate to the end proposed should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975); *In re Gustafson*, 650 F.2d 1017, 1022 (9th Cir. 1981) (en banc); *Harris v. United States*, 382 U.S. 162, 165 (1965). Not only was it unnecessary, the summary procedure was held violative of Respondent's due process rights given these facts. *In re Oliver*, 333 U.S. 257, 275-277 (1948).

Such a holding is not controversial nor does it fly in the face of authority, let alone California state court rulings, contrary to Petitioner's assertion.

The words of the California Supreme Court in *In re Hallinan*, 71 Cal. 2d 1179, 1183-1185, 81 Cal. Rptr. 1 (1969) may be instructive:

> It appears appropriate to once more emphasize as was done in *Gallagher v. Municipal Court*, supra, 31 Cal.2d 784, 789, that "The heat of courtroom debate, particularly where liberty is concerned, often gives rise to persistence on the part of counsel. If the words used by counsel are respectful and pertinent to the matter before

> the court, it is not unnecessarily burdensome to require the judge first to warn the attorney . . . [that his actions] tend to interrupt the due course of the proceeding . . . ." More recently this court again commented that the summary contempt power "must be exercised with great caution, lest it stifle the freedom of thought and speech so necessary to a fair trial under our adversary system."

In re Hallinan, supra, at 1185.

Attempting to waive a red "Ninth Circuit" flag at this Court by claiming that sufficient deference to state court findings had not been given by the Court of Appeals is inappropriate and unappealing. (*See* Petition at 5).

There is no issue that calls to this Court to review.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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No. 96-1383

In The

Supreme Court of the United States

October Term, 1996

WILLIAM R. POUNDERS, Judge of the Superior Court of the State of California for the County of Los Angeles,

Petitioner,

vs.

PENELOPE WATSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITON

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RESPONDENT'S CONTENTION THAT SHE WAS NOT AWARE OF THE ORDERS SHE VIOLATED WAS REJECTED BY ALL CALIFORNIA COURTS AND BY THE U.S. DISTRICT COURT, AND IS IRRELEVANT TO THE NINTH CIRCUIT OPINION AND TO THE REASONS FOR GRANTING REVIEW.

Respondent in her reply to the petition contends that the petition is misleading because it does not discuss in detail respondent's claim that she was unaware of the trial court's order that she violated. Respondent's contention was not only rejected by the trial judge and not found to be a basis for review in any California appellate court, but was also rejected by the United States District Court Judge who stated:

> "The record makes it quite clear that multiple statements made in open court gave Petitioner adequate warning to put a person of reasonable intelligence on notice as to what conduct Judge Pounders had prohibited, satisfying due process notice requirements." (Sept. 8, 1994, District Court Order denying petition for habeas corpus, App. 15).

Most importantly, the reasons for granting review are in no way affected by respondent's rejected claim that she was unaware of the court's order despite its repeated restatement in open court and despite the court's repeated warnings. The Ninth Circuit decision for which review is sought never reached this contention of petitioner, and its decision is not in any way dependent upon that contention. (Ninth Circuit opinion, App. 11.)

Review should be granted because, contrary to long-standing California authority, the Ninth Circuit in this case has held that even the willful disobedience of an order not

to ask certain prejudicial questions after warnings not to do so cannot be summarily punished by contempt unless a reviewing court independently concludes that the attorney would continue to disobey the order unless she were immediately punished. California authority, including *In re Hallinan*, 71 Cal.2d 1179, 1183-1185, 81 Cal.Rptr. 1 (1969), relied upon by respondent in her opposition to the petition for certiorari, has consistently held that if warnings have been given that the attorney's conduct is disruptive to the proceedings, a trial court may thereafter summarily hold the attorney in contempt for willful violation of the order and warnings to cease the conduct, because "disobedience of court orders tends to lessen the effect of those orders." *Gallagher v. Municipal Court*, 31 Cal.2d 784, 797, 192 P.2d 905, 914 (1948).

Without authority to impose immediate sanction when an attorney persists in violating a court's orders during a jury trial despite repeated warnings not to do so, trial courts will lack effective tools to ensure the orderly conduct of proceedings before them.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(4)

SUPREME COURT OF THE UNITED STATES

WILLIAM R. POUNDERS, JUDGE, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY *v.* PENELOPE WATSON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1383. Decided June 27, 1997

PER CURIAM.

In this case the Court of Appeals for the Ninth Circuit granted respondent's habeas corpus petition and held invalid on due process grounds her conviction for summary contempt before a state court judge for conduct in open court. The Court of Appeals misinterpreted the constitutional requirements for imposition of a summary contempt order. We grant the petition for a writ of certiorari and reverse.

Respondent Penelope Watson is an attorney who represented William Mora in a multidefendant murder trial in the Superior Court of the State of California in and for the County of Los Angeles. The Honorable William Pounders presided over the case, and he is the petitioner here. On April 7, 1994, counsel for one of Mora's codefendants repeatedly raised in open court the issue of the punishment defendants might receive if they were convicted. Judge Pounders stated that possible punishment "'is not a subject that's open to discussion. It should not be explored.'" App. to Pet. for Cert. 20. Though it is not clear whether this was said at a bench conference only or reiterated in open court, it seems respondent remained at the defense table during the bench conference. Her co-counsel, Joseph Gutierrez, was at the bench on behalf of their client Mora. In later proceedings, Judge Pounders noted that "Miss Watson is

9 pp

no more than six feet away from us when we're at the side bar conference. She's at the end of the center table closest to the bench and only a matter of feet away." *Id.*, at 36.

On April 20, counsel for a different codefendant again raised the issue of punishment. Judge Pounders stated in open court: "'[T]he subject of sentencing of Mr. Fernandez is not part of the conversation. But more than that, it is prejudicial under [Cal. Evid. Code Ann. §]352 [(West 1966)]. It's not a subject the jury is entitled to discuss. This is not a death penalty case, so penalties are not something to discuss . . . .'" *Id.*, at 21.

The next day, petitioner's co-counsel Gutierrez asked a series of questions in which he stated that defendants were "looking at life in prison." At a bench conference, while respondent remained at the defense table, Judge Pounders told Gutierrez:

> "'You had an ulterior motive in bringing out the amount of time [the witness] spent [in prison], and I think it's to show the contrast between what he got and what your clients may be facing, and you continue to say life. . . . I'm saying that's the last time I want to hear anything about a sentence. . . . You've covered it. Do not cover it again.'" *Watson v. Block*, 102 F. 3d. 433, 435 (CA9 1996).

After the side bar, Gutierrez apologized in open court:

> "'Judge, I would just like the record to reflect that I apologize to this court for asking the question as to or informing this witness through my question that he served six months in jail and three years probation. . . . I obviously defied the Court Order, and I misunderstood the Court and I apologize.'" *Ibid.*

In response, Judge Pounders said in open court: "'It's simply that punishment is not an issue for this jury to decide, and the more that counsel want to harp on

this issue of punishment, the more inappropriate it becomes.'" *Ibid.*

On June 21, while respondent was questioning Mora, the following examination and colloquy occurred:

> By Ms. Watson: "[T]hroughout this trial sometimes you've had to get up at 4:00 in the morning and not go to sleep until 10:00 at night?
>
> "Ms. Walker [for the People of California]: Objection, your honor, relevance.
>
> "The Court: Sustained.
>
> "By Ms. Watson: And during that four years [that you have been in prison], you were facing the death penalty until just the day before we started.
>
> "Ms. Walker: Your honor, People are going to object.
>
> "The Court: Sustained.
>
> "Ms. Walker: Ask Miss Watson to be admonished and the Court—
>
> "The Court: Sustained. We've already talked about this at side bar. Follow the Court's admonitions.
>
> "By Ms. Watson: You're facing life without possibility of parole?" App. to Pet. for Cert. 30–31.

At that point, Judge Pounders called counsel to the bench. The judge asked respondent why he should not hold her in contempt for discussing punishment after he had "at least twice ordered counsel not to cover" the issue. Respondent replied, "I think it goes to [Mora's] state of mind as to why he would take this risk at this point in revealing that he was the person who called 911." When the judge asked why respondent did not raise the point at sidebar, particularly when her co-counsel Gutierrez had been admonished for raising the issue, Watson responded: "I wasn't at side bar with any of that involving Mr. Gutierrez . . . ." The judge said, "You're in violation of a court order. You do not think that's relevant to anything?" Watson responded, "I didn't think it was." *Id.*, at 31, 32.

Judge Pounders then found respondent in contempt for

violating Cal. Civ. Proc. Code Ann. §1209(a)(5) (West 1997), which provides that "[d]isobedience of any lawful judgment, order, or process of the court" is grounds for contempt. The next day, on June 22, the judge issued a written order of contempt finding that "the questions asked by contemnor of Defendant Mora in the presence of the jury had as its *[sic]* sole purpose improperly advising the jury of the potential penalty for the defendants in violation of the court order." *Id.*, at 26. He found "contemnor was aware of the Order," since she was

> "at all times . . . present (a) at or immediately adjacent to all side bar conferences and (b) present in open court on April 7, 1994, when the initial warning was given, and (c) on April 20, 1994, when the warning was repeated in open court, and (d) on April 21, 1994, when co-counsel Mr. Gutierrez apologized in open court for defying that same order." *Ibid.*

The court imposed a 2-day jail sentence to be served after trial.

On July 8, two days after the murder case was submitted to the jury, Judge Pounders gave respondent another opportunity to justify her actions. She again explained and argued through her counsel that she thought her questions were relevant and "'not covered by the court's previous rulings or admonitions.'" 102 F. 3d, at 436. Judge Pounders was not convinced. Respondent, he noted, did not ask for a side bar for clarification. He found:

> "I think she has permanently prejudiced this jury in favor of her client. . . . They know the penalty he's facing . . . and they know that the person that was killed [a gang member] isn't worth that penalty, and so they are not going to find him guilty of the major charge.
>
> . . . . .

> "'And when the penalty is as extreme as this one is presented to the jury, I think that's a prejudice that cannot be overcome. . . .
>
> . . . . . .
>
> "'And I believe that the result is going to be that [the jury] will not find Mr. Mora guilty of the main offense, which is murder, that they may not find him guilty of much at all.'" *Ibid.*

Respondent's habeas petitions to the District Court of Appeals and the California Supreme Court were denied summarily. She filed this federal habeas corpus action in the United States District Court for the Central District of California. The District Court denied the petition on September 8, 1994, finding "[t]he record makes it quite clear that multiple statements made in open court gave Petitioner adequate warning to put a person of reasonable intelligence on notice as to what conduct Judge Pounders had prohibited, satisfying due process notice requirements." App. to Pet. for Cert. 15.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit, arguing that her due process rights were violated because she did not have notice of the prohibited conduct and because the trial judge could not have known without a hearing whether her conduct was willful. The Court of Appeals did not dispute the state trial court's findings on these points. Instead, it held that "her conduct was not so disruptive as to justify use of summary contempt procedure," 102 F. 3d, at 437.

Longstanding precedent confirms the power of courts to find summary contempt and impose punishment. See, *e.g.*, *Ex parte Terry*, 128 U. S. 289 (1888). In *Cooke* v. *United States*, 267 U. S. 517 (1925), the Court said:

> "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in

> open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law." *Id.*, at 534–535.

As we have recognized, however, the contempt power may be abused. We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver*, 333 U. S. 257, 275 (1948) (quoting *Cooke, supra,* at 536).

We have stressed the importance of confining summary contempt orders to misconduct occurring in court. Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication. See *In re Green*, 369 U. S. 689, 692 (1962) (relying on due process cases); *Harris* v. *United States*, 382 U. S. 162, 164 (1965) (defining boundary between summary and ordinary contempt under Fed. Rule Crim. Proc. 42).

United States v. *Wilson*, 421 U. S. 309 (1975), sheds light on the case before us. In *Wilson*, the prosecution called two witnesses who, in open court, refused to testify. The United States District Court granted immunity and ordered them to answer. The witnesses still refused, and the court summarily held them in contempt. We noted that although the witnesses' refusals to testify were "not delivered disrespectfully," *id.*, at 314, their conduct nevertheless justified summary contempt under Rule 42(a). It was not intimated that

the contempt convictions there violated due process. "The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court . . . ." *Id.*, at 316. Even the dissent suggested contempt convictions would have been warranted if the witnesses had engaged in "'insolent tactics.'" *Id.*, at 326 (Brennan, J., dissenting) (quoting *Harris*, 382 U. S., at 165).

In this case the state trial court made an express finding that respondent willfully refused to comply with the court's order. Again and again the trial court admonished counsel, both in open court and at bench conferences when respondent was sitting a few feet away, not to discuss punishment. After respondent asked her client whether he had been facing the death penalty, the court sustained an objection and said "'We've already talked about this at side bar. Follow the Court's admonitions.'" App. to Pet. for Cert. 24. Undaunted, respondent's next question was, "'You're facing life without possibility of parole?'" *Id.*, at 25.

The Court of Appeals did not question the willfulness finding in its opinion. 102 F. 3d, at 438 ("[W]e do not decide the issue whether Ms. Watson willfully disobeyed a court order"). Instead, the Court of Appeals held her conduct was not sufficiently disruptive because she herself "did not engage in a pattern of repeated violations that pervaded the courtroom and threatened the dignity of the court" and because the record did not indicate she would have repeated the references to punishment unless she were held in summary contempt. *Ibid.*

All that is before us is the ruling that respondent's conduct was not disruptive enough to justify contempt, and on this issue we are in disagreement with the Court of Appeals. Nothing in our cases supports a requirement that a contemnor "engage in a pattern of repeated

violations that pervaded the courtroom" *ibid.* before she may be held in summary contempt. To the contrary, in *Wilson*, the summary contempt convictions were upheld after a single refusal to give immunized testimony, "not delivered disrespectfully." 421 U. S., at 314. We nevertheless held that the conduct there "disrupt[ed] and frustrat[ed] an ongoing proceeding." *Id.*, at 316. And we have not required that a court determine a contemnor would have repeated the misconduct but for summary punishment. While we have approved, in the context of reviewing a federal contempt order, the equitable principle that only "'the least possible power adequate to the end proposed' should be used in contempt cases," *id.*, at 319 (quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821)), we found that principle satisfied in the circumstances in *Wilson* because, during an ongoing trial, the court is justified in acting swiftly "to prevent a breakdown of the proceedings." 421 U. S., at 319. Likewise, in *Sacher* v. *United States*, 343 U. S. 1, 5 (1952), the Court upheld summary contempt convictions of counsel where the misconduct had the following characteristics: "It took place in the immediate presence of the trial judge; it consisted of breaches of decorum and disobedience in the presence of the jury of his orders and rulings upon the trial; the misconduct was professional in that it was that of lawyers" and conviction was based "upon a course of conduct long-continued in the face of warnings that it was regarded by the court as contemptuous." See also *Groppi* v. *Leslie*, 404 U. S. 496, 506 (1972). Cf. *Illinois* v. *Allen*, 397 U. S. 337, 343 (1970) ("We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.")

Here the trial court expressly found that respondent's questions had "permanently prejudiced the jury in favor of her client" and that the prejudice "cannot be overcome." The Court of Appeals glossed over the state court finding, saying "we can understand Judge

Pounders' concern that her two questions *might* prejudice jurors in favor of her client," 102 F. 3d, at 438 (emphasis added). Seriously prejudicing the jury is comparable in terms of damage to the administration of justice to the refusals to testify in *Wilson*. The trial court's finding that respondent's comments had prejudiced the jury—together with its assessment of the flagrance of respondent's defiance—support the finding of the need for summary contempt to vindicate the court's authority.

While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the states must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted. As we have noted, we have used various phrases to describe the type of conduct required. We need not explore these limitations and standards, however, for the conduct of counsel here was well within the range of contumacious conduct disruptive of judicial proceedings and damaging to the court's authority. Advocacy that is "fearless, vigorous, and effective," *Sacher*, 343 U. S., at 13, does not extend to disruptive conduct in the course of trial and in knowing violation of a clear and specific direction from the trial judge.

On the record before us, the Court of Appeals was in error. It was error for the Court of Appeals to rule, as a matter of law, that the contempt order went beyond those necessities pertaining to the ordered administration of justice. The ruling of the Court of Appeals, not reviewed en banc, introduced uncertainty into routine proceedings of the many state courts within the Court of Appeals' large geographical jurisdiction. The judgment is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

WILLIAM R. POUNDERS, JUDGE, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY *v.* PENELOPE WATSON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1383. Decided June 27, 1997

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

As the Court correctly explains, the record supports the conclusion that respondent defied a court order when she asked two questions about her client's potential punishment. I assume therefore that she acted in contempt of court. The record also demonstrates, however, that no further misconduct or disruption of the trial occurred. The question the Court of Appeals addressed was whether these circumstances justified a summary contempt proceeding conducted by the judge before whom the contempt occurred. I do not agree with the Court that the answer to this question is so clear as to justify summary reversal.

In the majority of the cases relied on by the Court, the summary contempt power was invoked to punish conduct that threatened to disrupt the court's on-going proceedings. See, *e.g.*, *United States* v. *Wilson*, 421 U. S. 309 (1975). A more substantial question arises when the summary contempt proceeding is not invoked to prevent disruption of the trial, but to punish action that has already occurred. As Justice Frankfurter recognized in his dissenting opinion in *Sacher* v. *United States*, concerns about the adequacy of procedural safeguards are heightened in cases involving summary contempt procedures:

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> "Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. In this case, the course of events to the very end of the trial shows that summary measures were not necessary to enable the trial to go on. Departure from established judicial practice, which makes it unfitting for a judge who is personally involved to sit in his own case, was therefore unwarranted....
>
> "This, then, was not a situation in which, even though a judge was personally involved as the target of the contemptuous conduct, peremptory action against contemnors was necessary to maintain order and to salvage the proceedings. Where such action is necessary for the decorous continuance of a pending trial, disposition by another judge of a charge of contempt is impracticable. Interruption for a hearing before a separate judge would disrupt the trial and thus achieve the illicit purpose of a contemnor." *Sacher* v. *United States*, 343 U. S. 1, 36–37, 39 (1952) (Frankfurter, J., dissenting).

We recognized these limits to a court's summary contempt power in *In re McConnell*, 370 U. S. 230 (1962), where we granted plenary review and set aside a $100 contempt sanction for conduct that was more disruptive (although arguably more justified) than what occurred in this case.* We emphasized that:

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*In *McConnell*, the judge had erroneously ruled that plaintiff's counsel could not try a charge of conspiracy, holding that he must do so in a separate trial. To preserve his client's rights on appeal, counsel persisted in asking questions in the presence of the jury regarding the conspiracy charge. Counsel then refused to obey the judge's order to stop asking the questions, and stated that he would

> "To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case." *In re McConnell*, 370 U. S. 230, 236 (1962).

Given that the respondent in this case asked two inappropriate questions over the course of a three and a half month long trial and that the trial continued without incident for two weeks after her contemptuous conduct, a substantial question exists as to whether fair procedure required a hearing before another judge. Neither the Court nor the petitioner contends that this summary contempt power was exercised to prevent the "actual obstruction of justice," such that a hearing before an entirely disinterested judge would have been impractical. Because I believe that these questions are important and not clearly answered by our precedents—indeed, the Court does not cite a single case that is at all comparable to this one on its facts—it is unwise to answer it without full briefing and argument.

Accordingly, I respectfully dissent.

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continue to do so unless stopped by the bailiff. After a recess, plaintiff's counsel returned to trial and asked no more forbidden questions. Following trial, and after holding a hearing, the trial judge summarily found counsel guilty of contempt and imposed a jail sentence. On appeal, the Court of Appeals sustained the convictions, but reduced the sentence to a fine of $100.